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In the

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1989

Edna Emerson Littlewolf, et al.,

Petitioners,

-v.-

Manuel Lujan, Jr.,
Secretary of the Interior, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief for Respondents Becker, Clearwater and Mahnomen Counties

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Response in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Respondents Becker, Clearwater and Mahnomen Counties in the State of Minnesota oppose the petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit entered on June 30, 1989.

Questions Presented for Review

1) Whether the compensation provision of the White Earth Reservation Land Settlement Act of 1985 (land value plus compounded interest) is reasonable and represents a good faith effort to compensate fairly under the Just Compensation Clause. The Court of Appeals for the District of Columbia Circuit correctly held in the affirmative.

2) Whether the remedy provided in the White Earth Reservation Land Settlement Act for filing a Tucker Act claim meets Due Process standards. The Court of Appeals for the District of Columbia Circuit properly held in the affirmative.

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STATEMENT OF THE CASE

Nature of the Action

Petitioners would have this Court declare unconstitutional the White Earth Reservation Land Settlement Act of 1985, 25 U.S.C. § 331 (note) ("WELSA" or "the Act"), legislation which was carefully crafted by Congress in response to a serious and extensive land claims controversy adversely affecting hundreds of individuals, both Indian and non-Indian, by creating social, economic and political hardships in the White Earth region in the State of Minnesota. Both the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit held that the Act meets constitutional requirements. Littlewolf v. Lujan, 877 F.2d 1058 (D.C.

Cir. 1989); Littlewolf v. Hodel, 681 F. Supp. 929 (D.D.C. 1988).

Petitioners now seek review of the Court of Appeals' holding that the compensation provision of WELSA is reasonable, and that the Tucker Act remedy set forth in WELSA meets due process standards. However, neither of these holdings is one which is in conflict with the decisions of another federal court of appeals, neither involves an important and unsettled question of federal law, and neither is in conflict with decisions of this Court. Therefore, the petition for a writ of certiorari should be denied.

WELSA was enacted by Congress to settle unresolved and legally uncertain claims to lands within the original boundaries of the White Earth Reservation in the State of Minnesota. The land

controversy that WELSA was enacted to resolve remains (pending this litigation) a situation that cries out for a final solution by means of the well-reasoned and comprehensive compromise Congress has adopted. Without this legislation, the only resolution is litigation which would likely be unsatisfactory to the petitioners and costly to all concerned.

In light of the historical background and specific developments at White Earth Reservation in Minnesota, Congress acted rationally when it enacted WELSA. Congress had before it sufficient facts and opinions relative to White Earth, past and present, to conclude that the Act was necessary, consistent with its trust responsibilities, and a

reasonable response to a complicated situation.[1]

Historical Background

The White Earth Reservation in Minnesota was formally set apart for the Chippewas of the Mississippi by Executive Order of President Hayes on March 18, 1879, under authorization of the Treaty of March 19, 1867 between the United States and the Chippewa Indians. Beginning in the 1890s, each individual tribal member was issued a trust patent for 80 acres of land within the

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[1] See generally, Unresolved Claims on the White Earth Indian Reservation: Hearing on S.885 Before the Select Committee on Indian Affairs of the United States Senate, Sen. Hearing 936, 98th Cong., 1st Sess. (1983); White Earth Indian Land Claims Settlement: Hearings on S. 1396 Before the Select Committee on Indian Affairs of the United States Senate, Sen. Hearing 261, 99th Cong., 1st Sess. (1985); Sen. Rep. No. 192, 99th Cong., 1st Sess. (1985).

Reservation, in accordance with the General Allotment Act of 1887, which stated that the lands would be held in trust by the United States for a period of twenty-five (25) years free from any encumbrance, taxation and alienation without the approval of the Secretary of the Interior ("the Secretary"). The Steenerson Act of 1904 increased the size of each allotment on the White Earth Reservation from 80 acres to 160 acres.

The Clapp Amendment of 1906, 34 Stat. 353, as amended by the Act of March 1, 1907, 34 Stat. 1015, 1034, changed the nature of the allotment process at White Earth by removing "all restrictions as to sale, incumbrance, [sic] or taxation for allotments within the White Earth Reservation in the State of Minnesota ... held by adult mixed-blood Indians...."

While some of the conveyances by allottees following the enactment of the Clapp Amendment involved improper and fraudulent activity (which led to investigations by the Department of Justice and over 2,000 suits filed as a result),[2] the majority were made pursuant to the terms of the Clapp Amendment as it was interpreted and applied by federal officials.

Throughout this century, county and state governments and individual landowners relied on various Congressional acts and/or representations made by federal officials in matters relating to the sale, taxation and inheritance of allotments on White Earth. The Counties' reliance on these federal

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[2] Sen. Rep. No. 192 at 7-8.

policies was quite reasonable in light of the clear language of the Clapp Amendment. They commenced tax forfeiture proceedings[3] or recorded sales and mortgages of allotments held by adult mixed-blood Indians with federal approval, whether explicit or implied. Lands were bought and sold by innocent good faith purchasers consistent with the existing federal policies. These individuals had no legal reason to question title to the real property that was the subject of these transactions. The conveyances of White Earth land presented few problems until 1977.

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[3] After the Eighth Circuit held in Morrow v. United States, 243 F. 854 (8th Cir. 1917), that the trust patents were immune from taxation for twenty-five years, the counties cancelled tax forfeiture proceedings then pending or completed and, consistent with Morrow, did not commence taxation of allotments held by adult mixed-bloods until the 25 year trust period had expired.

Recent Developments at White Earth

In 1977, the Minnesota Supreme Court decided State v. Zay Zah, 259 N.W.2d 580 (Minn. 1977), cert. denied, 436 U.S. 917 (1978). Limiting its decision to the particular facts of the case, the Court held that the land of the original allottee, Zay Zah, was not subject to taxation by the state because the Clapp Amendment had not divested the trust relationship between the United States and Zay Zah, nor had Zay Zah consented to end the trust. The Court's reasoning was strongly and necessarily influenced by a stipulation between the parties that the land in question, which had been issued to Zay Zah after passage of the Clapp Amendment, was not subject to taxation for a period of 25 years. The Court stated that it reached "this result based

solely upon the facts of this case. We intimate no opinion as to what might be the result in a different factual setting." Id. at 589 (emphasis added).

Nonetheless, the Solicitor of the Department of the Interior ("DOI") adopted a vastly expansive reading of that case and determined that the Zay Zah decision invalidated title to any White Earth parcel that ceased to be owned by an Indian allottee in certain specified circumstances, including conveyances occurring as part of a state court probate, conveyances by mixed-blood females between the ages of 18 and 21, and transactions involving loss of an allotment through tax forfeiture. A 1979 memorandum of the Solicitor reversed sixty years of Department policy concerning probate of the estates of

mixed-blood allottees in state court and purported to invalidate all such probates. Similarly, the Solicitor reversed sixty years of settled law and practice which had held that the age of majority of mixed-blood females on the White Earth Reservation was consistent with state law (age 18 when the lands in question were transferred in the early 1900s) and reasoned (incorrectly) that transfers of land by such persons who were less than age 21 were invalid.

Based on these conclusions, beginning in 1979, the Solicitor's Office sent a remarkable set of letters to the past and current owners of over 110,000 acres of land whose title history showed one of those types of transactions. Each letter cited Zay Zah and stated that possible defects existed in the title to

a particular parcel or parcels of land. The Department advised the recipients of these letters that the Justice Department was being requested to bring legal actions to set aside title and to seek damages for trespass based upon such defects. In fact, not one such suit was initiated by the Justice Department.

The foreseeable and instant result of the letters threatening lawsuits was clouded titles to these lands. Not surprisingly, landowners and former owners were horrified at the prospect of the federal government suing to remove title or for damages. Quite naturally, no attorney could give an opinion that title to such land was free from defects. Sales, mortgages, and financing involving such lands were plunged into immediate chaos.

In Mahnomen County alone, approximately 45,000 acres, encompassing in excess of 350 separate households, are directly affected by this extremely serious problem which is causing continued hardships for county residents. Financial institutions refuse to lend money to either prospective buyers or to current owners who wish to expand or merely continue their current operations. These various banks and savings and loan associations will not even consider a loan application involving property on the White Earth Reservation unless it is accompanied by a title opinion stating that title to the land is not clouded by any of the potential "claims," or the loan can be secured by property other than the real estate. The significant

economic hardships already suffered by many landowners will never be remedied.

The land claims controversy has also been a significant contributing factor to poor local economic conditions and a major stumbling block to any economic resurgence in the three counties. For example, the record shows that valuations of land for tax purposes are unrealistically low as a direct result of the clouded titles, with the result that the counties' primary source of revenue is significantly reduced and an increasingly small number of taxpayers is funding basic services for all residents of the particular county, including tribal members.

Those persons who currently own lands with clouded title within the original exterior boundaries of the White

Earth Reservation have suffered extensive financial and personal harm as a result of the land claims controversy which WELSA was enacted to resolve. If petitioners are successful, these landowners will be open to continued potential litigation over title to their lands, litigation which will be costly, time-consuming and complicated for both the landowners and members of the petitioning class. The title problems which exist within the counties at the present time will exist indefinitely unless the settlement legislation takes effect.

The chaos, controversy and clouded titles created by the 1979 letters from the Solicitor, which led to enactment of WELSA, will continue if the parties are forced into court to litigate what may be

hundreds or even thousands of individual claims. Absent legislation, at a minimum hundreds of quiet title actions would be required at potentially great expense to innocent, good faith purchasers of these lands and to Indian allottees or heirs who may seek to have the title question resolved in their favor. Congress recognized that without this legislation, there is no alternative to litigation.

The legislative record demonstrates that Congress considered the many conflicting interests and problems involved: the potential claims of Indian heirs, the hardship and uncertainty created for landowners by the DOI's 1979 letters, the time and expense of litigating every claim, and the possible profound negative impact of continued conflict on the social well-being of all

reservation inhabitants, Indian or not. Congress crafted legislation in order to: 1) ensure that those allottees or their heirs with any claims, whether potentially meritorious or not, of the types raised by the DOI in its 1979 letters to landowners, would receive compensation without the necessity of expensive (and potentially fruitless) litigation, 2) provide the opportunity to litigate claims for those who would choose a judicial rather than legislative resolution, 3) settle the unresolved legal uncertainties relating to these claims arising from past federal laws and policies, and 4) provide the White Earth Band as a whole with economic assistance. The Act is a reasonable response to these various and complex problems.

REASONS FOR DENYING THE PETITION

1. Congress Has Broad Constitutional Power to Legislate Over Indian Affairs.

Federal power over Indian affairs has been interpreted broadly by the courts, primarily based on the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, the Treaty Clause, U.S. Const. art. II, § 2, cl. 2, and the Property Clause, U.S. Const. art. IV, § 3, cl. 2, of the United States Constitution. However, for most purposes it is sufficient to conclude that there is a single federal power over Indian affairs that is essentially an amalgam of specific constitutional clauses. See, e.g., United States v. Antelope, 430 U.S. 641 (1977).

While actions of Congress dealing with Indians are reviewable to determine

whether they are purely arbitrary, Congress has wide discretion in determining what is reasonably essential to the protection of Indians and its action "must be accepted and given full effect by the courts." Perrin v. United States, 232 U.S. 478, 486 (1914). Congress has transferred tribal lands to individual Indians without compensation to the tribe, terminated the trust status of tribal lands, determined which members of a particular tribe were entitled to share in the property and compensated tribes or individual Indians when "vested" property rights were taken away. See, United States v. Seminole Nation, 299 U.S. 417, 428-429 (1937); Sizemore v. Brady, 235 U.S. 441, 450 (1914); Choate v. Trapp, 224 U.S. 665 (1912). The enactment of WELSA was not an abuse of

Congressional discretion and must be given full effect.

2. WELSA is Tied Rationally to the Fulfillment of Congress' Obligation Toward the Indians of White Earth.

The standard of review for a Congressional enactment dealing with Indian affairs is whether the legislation being challenged is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 85 (1977), reh. denied, 431 U.S. 960 (1977) (quoting Morton v. Mancari, 417 U.S. 535, 555 (1974)). Where treatment of Indians through the legislation can be related rationally to legitimate objectives, Congressional judgment that the enactment is in the best interests of the Indians must not be

disturbed. Morton v. Mancari, 417 U.S. at 555.

As the courts below held, Congress' objectives are legitimate and meet the "tied rationally" test. Littlewolf v. Lujan, 877 F.2d at 1064; Littlewolf v. Hodel, 681 F. Supp. at 939. Congress determined that it was in the best interests of the allottees or heirs who may have a potential claim for title to a parcel (or a fractional share of a parcel) to settle these claims legislatively. Without legislation, each claim would have to be litigated separately, at a very high cost to the allottees and heirs. Furthermore, since the majority of these claims are of questionable legal merit (and are not "vested property rights"), litigation would be undertaken with no certainty

whatsoever that the outcome would be favorable to the individual Indians. WELSA provides compensation to the allottees and heirs regardless of the merits of the various claims. Clearly, WELSA was not an arbitrary act of Congress.

3. The Compensation Provided in WELSA is Not a Violation of the Due Process or Just Compensation Clauses.

Under the terms of WELSA, compensation is provided to any allottee or heir within the categories set forth in the Act, provided he or she did not bring a claim for title or damages prior to the running of the limitations period, regardless of whether she would have succeeded on the merits of her claim. Compensation is based on the fair market value of the land at the time it was

transferred (less any compensation actually received) plus five percent interest compounded annually up to the date of enactment and at the general interest rate thereafter.

Petitioners assert (without any supporting authority) that a "taking" occurs at that point in time when WELSA bars the right to commence lawsuits based on questionable and legally uncertain claims to title and/or for damages. Petitioners further argue that "the Act bars all actions to recover title," a statement that is simply false. As petitioners are well aware, potential claimants had over twenty-three months after WELSA was enacted to bring suit for title. Indeed, if one assumes for purposes of argument that the claims are "vested" property rights, as petitioners

assert, then the claims vested not with WELSA's enactment but rather when the lands were first transferred; therefore, these potential litigants have had forty to sixty years to bring their actions[4].

If there was a "taking," it occurred when the past transactions described in the Act removed the property from Indian ownership, and not at the time WELSA became effective. Antoine v. United States, 710 F.2d 477, 479 (8th Cir. 1983). The only logical time at which the "loss" can be viewed is the time the

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[4] Petitioners would have the Court believe that the "claims" to title are virtually certain of succeeding if litigated. The contrary has proven true thus far. Claims have been brought by approximately 40 allottees and heirs in Manypenny, et al. v. United States, et al., Civ. No. 4-86-770 (D. Minn.) and Fineday, et al. v. United States, et al., Civ. No. 6-88-18 (D. Minn). In each case, all claims against the United States, State of Minnesota, Becker, Clearwater and Mahnomen Counties, and numerous individual defendants have been dismissed.

allotment materially left Indian ownership. Id. If what is "taken" is a cause of action, as petitioners claim, common sense dictates that one looks to the time when the cause of action accrued, i.e., when the transfer took place, to calculate its value. Some of the lands involved have been held by non-Indians for over 70 years. To value the "taking" of land now is to give an heir or allottee the benefit of all improvements and enhancement of value contributed by third parties. There is no constitutional requirement for such a windfall.

Even if the claims were irrefutable, or could be considered vested property rights, the compensation is just pursuant to constitutional standards. This Court held in United States v. Creek Nation,

295 U.S. 103, 111 (1934), that compensation should be based on the value of the land at the time ownership changed. In addition, interest at a reasonable rate is appropriate in order "to produce the present full equivalent of that value...." Id. This Court reaffirmed that standard in United States v. Klamath and Moadoc Tribes, 304 U.S. 119, 123 (1938). The decision of the court of appeals, affirming the district court's holding that WELSA compensates fairly under the Just Compensation clause, is consistent with the prior rulings of this Court. Indeed, the compensation scheme exceeds constitutional requirements, and in fact, provides a handsome windfall to many heirs who are being compensated for claims which are not supportable and

would likely never be brought, a benefit which will be lost if petitioners are successful in invalidating the Act.

Furthermore, the Tucker Act remedy set out in Section 6(d) of the Act meets constitutional requirements. See, Regional Rail Reorganization Act Cases, 419 U.S. 102, 150 (1974). This mechanism allows individuals to challenge the constitutional adequacy of the specific compensation paid for a particular allotment or interest in an allotment. Thus, any person who believes his/her "claim" has a greater "value" than that determined by DOI has the opportunity to receive a full review of the specific claim and will be awarded compensation based on the individual merits of that claim. As the district court pointed out, the six month period allowed by

WELSA for bringing a Tucker Act claim follows "a long period of time in which allottees could have discovered information about their land claims." Littlewolf v. Hodel, 681 F.Supp. at 948. Indeed, by the time compensation has been calculated by DOI, all of the relevant information pertaining to a particular allotment will have been gathered and examined. Presumably, that information will be available to the allottee or heir. If anything, appellants will be in a better position in terms of information at hand than a typical Tucker Act claimant.

CONCLUSION

For all of the reasons set forth herein, the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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